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TAMAN RIMBA (MENTAKAB) SDN BHD v. WARRIOR RUBBER PRODUCTS (M) SDN BHD; CINDEE DEVELOPMENT SDN BHD & ANOR (CONTRIBUTORIES)

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
B [COMPANIES WINDING UP NO: WA-28NCC-165-03-2017]
11 DECEMBER 2017

CIVIL PROCEDURE: *Execution – Stay – Application for – Stay of execution of winding-up order pending appeal – Whether potential conflicting decisions may*
C *arise by different courts regarding same issues between same parties – Special circumstances – Whether established – Whether prejudice occasioned against any party if stay granted – Whether granting of stay justified – Whether requirements of s. 492 of Companies Act 2016 met – Courts of Judicature Act 1964, s. 73 – Rules of Court 2012, O. 45 r. 11*

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COMPANY LAW: *Winding-up – Stay – Application for – Stay of execution of winding-up order pending appeal – Whether potential conflicting decisions may arise by different courts regarding same issues between same parties – Special circumstances – Whether established – Whether prejudice occasioned against any party if stay granted – Whether granting of stay justified – Whether requirements*
E *of s. 492 of Companies Act 2016 met – Courts of Judicature Act 1964, s. 73 – Rules of Court 2012, O. 45 r. 11*

This was an application (encl. 42) filed by two contributories of the respondent seeking a stay of execution of the winding-up order granted against the respondent, pending the hearing of the contributories' appeal
F against the order to the Court of Appeal. There were other proceedings in a different High Court (NCC2) involving largely the same parties which concerned subject matters raised in the winding-up proceedings. That was the dispute between the petitioner, the contributories, the respondent and the majority shareholders of the respondent whereby the contributories had filed
G a minority oppression suit against the controlling shareholders of the respondent with respect to the majority's attempts to dispose of three pieces of land ('the said lands') being the sole assets of the respondent, to the petitioner ('the oppression action'). The debt said to be due from the respondent to the petitioner was initially set out in a consent judgment
H whereby a settlement agreement was subsequently entered into between the petitioner and the respondent. The High Court in NCC2, as part of the oppression action, granted an interlocutory injunction against the transfer of the said lands to the petitioner. At the same time, the petitioner moved to file the winding-up proceedings against the respondent on the basis of the
I debt under the consent judgment. The contributories then filed their opposition to the winding-up proceedings and sought a stay and/or strike out of the petition on the ground that the consent judgment had been superseded and compromised by the settlement agreement and thus there was no debt

actionable under the winding-up proceedings. The contributories' application for a stay and striking out was dismissed and the winding-up was allowed. The contributories thus filed appeals against the said decisions to the Court of Appeal, which were now pending. The contributories then instituted the instant stay application. The contributories argued that there potentially arose conflicting decisions by different courts regarding the same issues in the same transaction between the same parties and thus a stay of execution ought therefore to be granted pending the appeals.

Held (allowing encl. 42 with costs)

(1) Applying any of s. 73 of the Courts of Judicature Act 1964 ('CJA'), s. 492 of the Companies Act 2016 ('CA') on stay or the stay principles under the court's inherent jurisdiction, fundamentally, whether or not a stay would be granted was entirely the exercise of the court's discretion on the basis of the material before it as presented by the applicant who bears the burden of justifying the need for a stay. The contributories were certainly in possession of the right on legal standing to make that application, based on the language of s. 492. (para 40)

(2) An application for a stay of execution of judgment is also governed under O. 45 r. 11 of the Rules of Court 2012. The applicant must demonstrate that his application fell within the scope of the said provision. The contributories herein must be able to satisfy the court that there were matters that had occurred since the date of the winding-up order which would or might have prevented the order being made or would or might have led to a stay of execution if they had already occurred at the date of the order. The discovery of the alleged conflicting findings upon the availability of the grounds of decision post the granting of the winding-up order could be validly characterised as a matter which occurred since the date of the order. (paras 42, 46 & 48)

(3) The crux of the reason for stay in the application herein, in essence, was the potential for conflicting findings on the status of the consent judgment in light of the decisions by the High Court in NCC2 on the injunction against the transfer of the said lands, which found that the questions surrounding the consent judgment raised serious issues to be tried, and that given the alleged dispute on the debt the petitioner should not have presented the petition for the winding-up of the respondent. There was a risk of conflicting findings on the key issues concerning the consent judgment which also extended to the question on the existence of a *bona fide* debt by the respondent to the petitioner. (paras 53 & 55)

(4) This court was therefore inclined to allow the stay on the basis of the potential for conflicting findings by two different courts on issues which were pending before the Court of Appeal. The risk of conflicting decisions, on the evidence of what appeared to be findings by the High

Court in NCC2 on material issues, which were contrary to the conclusions arrived at in the deliberative process to wind up the respondent, to be one that fulfilled the character of being more than ordinary and could even be construed as exceptional. It was therefore a form of special circumstances. The apparent conflict would also serve to meet the requirements of s. 492 of the CA, which mandated "… proof to the satisfaction of the court" that all proceedings in relation to the winding-up of the respondent ought to be stayed. (paras 57 & 58)

(5) Not much prejudice, if any, would be occasioned to the petitioner as a result, for the stay to be granted was only to operate for a specified and limited time, which, specifically was until the disposal of the appeals against the dismissal of the striking out of the petition and the granting of the winding-up order of the respondent at the Court of Appeal. The contributories succeeded in establishing special circumstances to justify the granting of the stay of the winding-up order against the respondent for a limited time, that was only pending the disposal of the appeal of the decisions granting the said winding-up order and in dismissing their striking out application. (paras 59 & 60)

Case(s) referred to:

BBMB Leasing Sdn Bhd v. Aquacut Sdn Bhd & Ors (No 2) [2011] 1 LNS 1249 HC ***(refd)***

Equiticorp Holdings Ltd v. United Securities Sdn Bhd [2007] 6 CLJ 268 CA ***(refd)***

Ga-Seng Paper Marketing Sdn Bhd v. Percetakan Warni Sdn Bhd [2015] 9 CLJ 640 HC ***(refd)***

Hermehinder Singh Lachman Singh v. Dhatt Bros Plantations Sdn Bhd [2009] 1 LNS 1649 HC ***(refd)***

Ho Num Chon & Anor v. Tech-Lab Manufacturing Sdn Bhd [2017] 5 CLJ 187 HC ***(refd)***

Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA ***(refd)***

Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd [2013] 3 CLJ 47 CA ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Leong Poh Shee v. Ng Kat Chong [1965] 1 LNS 90 HC ***(refd)***

Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC ***(refd)***

London Permanent Benefit Building Society v. De Baer [1967] 1 All ER 372 ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Berhad & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

Sal Leasing (Pte) Ltd v. Hendmaylex Pte Ltd & Ors [1987] 1 LNS 48 HC ***(refd)***

Sibu Slipway Sdn Bhd v. Yii Chee Ming & Ors And Other Appeals [2017] 6 CLJ 507 CA ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors [1995] 2 CLJ 392 CA ***(refd)***

Legislation referred to:
Companies Act 1965 (since repealed), s. 243(1)
Companies Act 2016, ss. 492, 493
Courts of Judicature Act 1964, s. 73
Rules of Court 2012, O. 45 r. 11

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Reported by Suhainah Wahiduddin

JUDGMENT
(encl. 42)

Mohd Nazlan Ghazali J:

Introduction

[1] This is an application in encl. 42, filed by two contributories of the respondent, seeking a stay of the execution of the winding-up order granted against the respondent, pending the hearing of the contributories' appeal against the order to the Court of Appeal.

[2] At the conclusion of the hearing, I granted stay. This judgment contains the full reasons for my decision.

Key Background Facts

[3] This court has granted a winding-up order against the respondent. It is not unknown that there are other proceedings in a different High Court (NCC2) involving largely the same parties which concerned subject matters which had also been raised in the winding-up proceedings. That is the dispute between the petitioner, the contributories, the respondent and the majority shareholders of the respondent in Kuala Lumpur High Court *vide* Suit No. WA-24NCC-84-03-2017 whereby the contributories on 9 March 2017 had filed a minority oppression suit against the controlling shareholders of the respondent with respect to the majority's attempts to dispose of the three pieces of lands ("the said lands") being the sole assets of the respondent, to the petitioner ("the oppression action").

[4] The debt said to be due from the respondent to the petitioner was initially set out in a consent judgment, whereby a settlement agreement was subsequently allegedly entered into between the petitioner and the respondent.

[5] The High Court in NCC2, as part of the oppression action, granted an interlocutory injunction on 19 May 2017 against the transfer of the said lands to the petitioner. At the same time, the petitioner moved to file the winding-up proceedings against the respondent on the basis of the debt under the consent judgment.

[6] The contributories then filed their opposition to the winding-up proceedings and sought a stay and/or strike-out of the petition on the ground that the consent judgment had been superseded and compromised by the settlement agreement and thus there was no debt actionable under the winding-up proceedings.

[7] Prior to the hearing of the winding-up proceedings, the petitioner was also joined as a party to the oppression action and the contributories had at the same time on 19 May 2017 amended the prayers to the originating summons in that action to include a prayer for the cancellation of the consent judgment. As such, it is a crucial assertion of the applicants herein (being the contributories) that at the time the petition was heard, the issues concerning the consent judgment were already before the oppression action.

[8] On 31 July 2017, I allowed the winding-up and dismissed the application by the contributories for a stay and striking out, with costs. On 3 August 2017, the contributories filed appeals against the said decisions to the Court of Appeal, which are now pending.

[9] The contributories then instituted the instant stay application.

The Essence Of The Contentions Of Parties

[10] The contributories primarily grounded their stay application on the issue of conflicting findings by different courts.

[11] The basis of this contention is that the grounds of judgments of the High Court in NCC2 (hearing the oppression action) on the said interlocutory injunction and the dismissal of an application by the petitioner to set aside its joinder thereat contain findings which are in conflict with certain of my determinations in the winding-up proceedings.

[12] It should be added that like my two decisions to dismiss the stay of winding-up proceedings by the contributories and the granting of a winding-up order to the petitioner, the two decisions of NCC2 mentioned in the immediately preceding paragraph are also pending appeal to the Court of Appeal.

[13] The assertion on the conflict is simply this. In the oppression action, the contributories challenged the existence of the debt under the consent judgment owed to the petitioner whereas this court allowed the winding-up of the respondent on the basis that the debt under the consent judgment is not *bona fide* disputed on substantial grounds.

[14] Thus, the grounds of judgment of the High Court in NCC2 for the injunction application include the following:

> [76] ... The Plaintiffs have intervened in the winding-up Court to restrain the winding-up against the Company. This Court has also allowed the Plaintiffs' application for Taman Rimba to be made a party to this Suit. The consent is an agreement which the Plaintiffs are contending that it was entered into with deceit or without sufficient basis. In the event the

Plaintiffs are able to prove after the OS is ventilated that there is no basis for the advances to Taman Rimba, the Court is entitled under s. 346(2) of the Act to cancel/vary the transaction. It cannot be gainsaid that the Plaintiffs claims appear from thin air.

[15] Taman Rimba is of course, the petitioner herein. Further, in the grounds for the dismissal of the setting aside of the joinder, the High Court in NCC2's findings include as follows:

[42] ... Clearly, Taman Rimba must be called to explain the allegation against the validity of the Consent Judgment and the Settlement Agreement (even though the Settlement Agreement was not executed). The lack of probity as alleged by the Plaintiffs in the transactions by the majority shareholder of the 1st Defendant and Taman Rimba are serious issues to be tried and unless Taman Rimba are called to explain their conduct and its alleged connection with the 1st Defendant, the allegations made by the Plaintiffs will stand unchallenged.

[16] It is also argued that the filing of the winding-up petition raised serious issues to be tried in the oppression action whilst this court granted the winding-up order. Thus, on the grounds in respect of the interlocutory injunction, the High Court in NCC2 also found as follows:

[82] ... It is of the considered view that the events of the suit filed by Taman Rimba earlier, the consent order, the settlement agreement, the non-disclosure of all those events in the EGM and finally the winding-up petition presented by Taman Rimba recently, bring this Court to the conclusion that there are serious issues to be tried.

[17] In the grounds on the setting aside dismissal, the High Court NCC2 further held as follows:

[55] So there is a serious question to be determined as to whether the terms of the Consent Judgment were controlled by an outside agreement between the 1st Defendant as the judgment debtor and Taman Rimba as judgment creditor. The determination of the question must be resolved as the Plaintiffs are alleging there was collusion between the 1st Defendant and Taman Rimba.

[18] I have, in the hearing of the petition, formed the view that the settlement agreement did not compromise the consent judgment whereas the High Court in the oppression action appears to have found that the consent judgment was compromised and superseded by the settlement agreement.

[19] Thus the learned High Court Judge in her granting of the interlocutory injunction, stated the following:

[84] ... but then it is the 1st Defendant's position that after the consent order there was a settlement agreement whereby they would transfer the land to Taman Rimba. As such the consent order could no longer stand as it has been compromised and superseded by the settlement agreement. This court agrees with the submission of the Plaintiff's learned counsel

A that on that basis, Taman Rimba should not have present the winding-up petition based on the consent order and that its remedy would be for specific performance.

[20] Given the foregoing, the contributories argued that there potentially arises conflicting decisions by two different courts regarding the same issues B in the same transaction between the same parties. A stay of execution ought therefore to be granted pending the appeals.

[21] The contributories make reference to a decision of the High Court in the case *Hermehinder Singh Lachman Singh v. Dhatt Bros Plantations Sdn Bhd* [2009] 1 LNS 1649 [Suit No. D7-28-410-2008] which made the following C observations:

> ... In my judgment, so long as there are material overlapping issues, then the risk of two Courts of coordinate jurisdiction making conflicting findings of facts and issues exists and this must be avoided by the granting of stay (*Lesco Development Corp. Sdn Bhd v. Malaysia Building Society* D *Bhd* [1988] 2 MLJ 184) ...
>
> In my judgment, over and above the risk of conflicting findings, there is also the issue of saving judicial time and desirability in the interests of justice that the common issues be debated and resolved by one Court of Law as held by the Court in *Lai Kim Loi v. Dato Fook Kim & Anor* [1989] E 2 MLJ 290

[22] It was further submitted that there is a genuine risk of two courts coming to conflicting findings of facts and law. Even though the issues in the oppression action have not been disposed of, there are clear findings on the debt under the consent judgment - that it being *bona fide* such that the F petitioner ought not to have proceeded with the winding-up proceedings. It was submitted that it is for the oppression action to decide on whether or not the debt was owed to the petitioner.

[23] The petitioner, in resisting the stay request, in the main, argued that the decisions in the oppression action referred to by the contributories are G preliminary and not final findings. It asserted that the contributories are pursuing their approach of blowing hot and cold by maintaining that the settlement agreement had compromised the consent judgment whilst at the same time in the oppression action included the prayer for the setting aside of the settlement agreement. The petitioner added that there would be no H prejudice if the winding-up proceedings is pursued since the transfer of the said lands is already restrained by the injunction granted by NCC2. And the respondent is, so the petitioner asserts, insolvent in any event. In short, the petitioner contends that there are no special circumstances to justify a stay.

[24] I understand the crux of the contributories' argument that the I determination of these issues would be academic if the petitioner proceeds with the winding-up of the respondent such that if the stay is not allowed, the appeal would be rendered nugatory.

[25] I am not unmindful of the decision of the Court of Appeal in *Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd* [2013] 3 CLJ 47 which ruled as follows:

> (3) Guided by principles governing the application for stay, it was clear that the assets of the company were not in jeopardy. The dispute between the parties was *bona fide* and should be decided in the 2006 Suit. It was the duty of the civil court and not the duty of the winding-up court to determine whether or not the debt was owed to the petitioner by the respondent (paras 24 & 25)

I should next first refer to the law governing stay.

Law On Stay Of Execution – Key Principles

[26] It is well settled that an appeal shall not operate as a stay. Section 73 of the Courts of Judicature Act 1964 ("the CJA") provides as follows:

> Section 73 CJA - Appeal not to operate as stay of execution.
>
> An appeal shall not operate as a stay of execution or of proceeding under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

[27] A number of key principles governing applications for stay, as distilled from leading decisions on the point, such as the Court of Appeal case of *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380; [2002] 3 MLJ 49 and the Federal Court judgment in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Sdn Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257, may be stated in summary fashion in the following terms:

(i) Stay may be granted if existence of special circumstances is established.

(ii) The onus is firmly on the applicant to establish and specifically aver in the supporting affidavit the existence of special circumstances to make out a case deserving of the grant of a stay of execution.

(iii) The special circumstances must relate to the enforcement of the judgment or order.

(iv) An appeal shall not operate as a stay of execution unless the court so order.

(v) There are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one.

(vi) The merit of a party's case in a stay application is not a relevant matter for consideration in the application.

[28] On the other hand, if a stay is granted, the effect of a stay of a winding-up would put an end to the winding-up process, which would enable the respondent to resume the conduct of its business as if no winding-up order existed at all. In *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors* [1995] 2 CLJ 392 the Court of Appeal said this on the effect of a stay order:

> The effect of an order to stay proceedings under the winding-up order altogether after a winding-up order has been made is a total discontinuance or termination of the winding-up proceedings ...

I shall now examine the issues.

Evaluation And Findings Of This Court

[29] Section 243 of the Companies Act 1965 provides as follows:

> (1) At any time after an order for winding-up has been made the court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit.
>
> (2) On any such application the court may, before making an order, require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant.
>
> (3) An office copy of every order made under this section shall be lodged by the company with the Registrar and with the official receiver within fourteen days after the making of the order.
>
> Penalty: One thousand ringgit. Default penalty.

[30] Under s. 243(1) of the Companies Act 1965 ("the CA 1965"), the court is thus empowered to make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit. A stay order under s. 243 takes effect from the date of pronouncement of the stay and not from the date of the winding-up order. The stay does not set aside or annul the winding-up order. The stay order only takes effect from the date of the stay order but its effect is plainly that the winding-up process comes to an end for the company can upon the stay thereafter resume the conduct of its business and affairs as if no winding-up order existed.

[31] A leading authority on stay application in the context of a winding-up under s. 243 is the Federal Court decision in *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors* [1995] 3 CLJ 493, which was analysed relatively more recently by the High Court in *Ga-Seng Paper Marketing Sdn Bhd v. Percetakan Warni Sdn Bhd* [2015] 9 CLJ 640 in the judgment of the learned Wong Kian Kheong JC who expressed his views on s. 243 thus:

[19] I am of the following view regarding s. 243(1) Companies Act 1965: A

(a) whether a Winding-Up Order should be stayed or not under s. 243(1) Companies Act 1965, depends on the exercise of the court's discretion based on the evidence adduced before the court - the Federal Court case of *Vijayalakshmi Devi*. It is trite law that the exercise of judicial discretion in a case is not a binding precedent from the view point of the *stare decisis* doctrine - please see the Court of Appeal's judgment in *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300, at p. 306. Reasons which are considered relevant and decisive in one s. 243 application, may not be pertinent or conclusive in another s. 243 application; B

(b) the legal burden to persuade the winding-up court to exercise its discretion to stay a Winding-Up Order under s. 243(1) Companies Act 1965 is on the applicant - the Federal Court's judgment in *Vijayalakshmi Devi*. Even if the petitioner, the company's liquidator and all the creditors and contributories of the company are unanimously in favour of a s. 243 application, the winding-up court may still refuse the s. 243 application if the applicant fails to discharge the legal onus to satisfy the court to stay the Winding-Up Order. In *Ting Yuk Kiong*, a s. 243 application was refused despite the Official Receiver's view that the company in question was solvent and the Official Receiver's support for the s. 243 application; C D

(c) as decided by the Federal Court in *Vijayalakshmi Devi*, the legal burden is on an applicant in a s. 243 application to make "a positive or sufficient case". The applicant should have a heavy burden as the effect of a stay under s. 243(1) Companies Act 1965 is permanent and far-reaching - the Court of Appeal case of *Vijayalakshmi Devi*. If the s. 243 application is allowed, there is always a risk that the "resurrected" company may subsequently be unable to pay its debts, to the detriment of creditors in particular and the business community in general; E F

(d) the factors to be considered by the winding-up court in considering a s. 243 application as explained in *Vijayalakshmi Devi* (Federal Court's judgment) and *Ting Yuk Kiong*, are not exhaustive. Judicial discretion of the winding-up court in deciding a s. 243 application should not be fettered as is clear from the phrase "on proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed" in s. 243(1) Companies Act 1965; and G

(e) if a company is wound up under s. 218(1)(e) Companies Act 1965 on the ground that the company is unable to pay its debts: H

(i) the winding-up court should give more weight to the consideration of public interest and commercial morality, than the wishes of the company's liquidator, creditors and contributories. This is because the winding-up court should be vigilant to ensure that s. 243(1) Companies Act 1965 is not I

abused to "resurrect" a commercially insolvent company to the detriment of the creditors in particular and the business community in general;

(ii) subject to the consideration of public interest and commercial morality, the wishes of the commercially insolvent company's contributories should be given less weight than the interest of the wound up company's creditors, especially unsecured ones. This is understandable in view of the limited liability of companies and their shareholders as embodied in s. 16(5) Companies Act 1965 (with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up);

(iii) to substantiate a s. 243 application, the applicant must adduce credible evidence that if the s. 243 application is allowed, the wound up company is likely to be commercially solvent and is likely to be able to pay its debts when such debts become due and payable in the future. In other words, there must be cogent evidence of the likelihood of the company's commercial solvency or cash flow solvency.

If there is no reliable evidence of the likelihood of the company's commercial solvency, the s. 243 application should be dismissed on this ground alone and it does not matter if the total value of the assets of the company exceeds its total liabilities (balance sheet solvency). This is because if such a company is "resurrected", the company may still be commercially insolvent and may incur debts to the prejudice of its creditors, contrary to public interest and detrimental to commercial morality.

[32] However, I do not think it is disputed that the cases referred to above concern a stay of the winding-up order on what in effect is on a permanent basis. Section 243 however, as stated earlier, also permits a stay be granted for a limited time on such terms and conditions as the court thinks fit. As such, the principles otherwise adopted in considering a permanent stay application against a winding-up order ought not to be applied with equal force in requests for stay other than on a permanent basis.

[33] Thus, it is unnecessary for instance for the court to insist on, in every stay application, for the liquidator's report to be produced to show evidence of likelihood of commercial solvency, which as decided in *Ga-Seng* would be some of the essential prerequisites (in a permanent stay situation). In my view, the discretion of the court in evaluating the merits of a stay application otherwise than for a permanent basis ought to be guided by the test of the applicant for stay showing the existence of special circumstances as elaborated in *Kosma Palm Oil Mill* (see further below).

[34] In the instant application before me, the contributories are asking only for a stay pending the disposal of the appeal against my decisions ordering the winding-up of the respondent and the dismissal of the strike out application of the petition by the contributories. They are not asking for a permanent stay.

[35] And the law has also seen some changes in this exact respect. The concept of permanent stay has, since the coming into force of the Companies Act 2016 ("the CA 2016") been replaced with termination of winding-up under s. 493 of the CA 2016. A stay designed for a limited period is now found in s. 492. The material parts of these two provisions are set out as follows:

492 Power of Court to stay winding-up

(1) At any time after an order for winding-up has been made, the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up of the company ought to be stayed, make an order staying the winding-up of the company for a specified time on such terms and conditions as the Court thinks fit.

(2) Where the Court makes an order under subsection (1), the liquidator shall cease to conduct any further action on behalf of the company from the date of such order.

493 Power of Court to terminate winding-up

(1) At any time after an order for winding-up has been made, the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up of the company ought to be terminated, make an order terminating the winding-up of the company as the Court thinks fit.

(2) In making an order under subsection (1), the Court may take into consideration, but not limited to, the following facts:

(a) the satisfaction of the debts;

(b) any agreement by the liquidators, creditors, contributories and other interested parties; or

(c) other facts that the Court considers appropriate.

(3) Where the Court makes an order under subsection (1), the company ceases to be in liquidation and the liquidator ceases to hold office and be released from all liability in respect of any act done or default made by the liquidator in the administration of the affairs of the company or otherwise in relation to his conduct as liquidator, with effect from the making of the order or such other date as may be specified in the order ...

[36] In my view, these two new provisions essentially make more express and explicit what were already previously contained in s. 243 of the CA 1965. The new sections clearly distinguish stay from termination, and at the same time effectively do away with that nebulous concept of a "permanent stay". It is now either a stay for a specified time under s. 492 of the CA 2016 or a termination of the winding-up order altogether under s. 493. It is when considering an application for termination of winding-up under s. 493 of the CA 2016 that the principles governing permanent stay under s. 243 of the CA 1965 ought to be considered.

[37] Further, even though a winding-up order was made under the provisions of the CA 1965 (and now the CA 2016) where the legislative scheme contains only the express power to stay a winding-up order (now terminate as well) and that there was no provision allowing for the setting aside of the order, it has been held as recently by the Court of Appeal in *Sibu Slipway Sdn Bhd v. Yii Chee Ming & Ors And Other Appeals* [2017] 6 CLJ 507; [2017] 1 MLJ 368 that the court continues to retain an inherent jurisdiction to set aside a winding-up order in appropriate circumstances such as especially when there has been a clear breach of the statutory winding-up provisions. But that discussion is quite outside the remit of this judgment.

[38] Similarly, the enactment of the stay and termination provisions in the CA 2016 does not translate into the ousting of the court's inherent jurisdiction to grant a stay of execution. In any event, I would venture to add that there ought really to be no cause for conflict between a stay pursuant to s. 492 of the CA 2016 and stay under the court's inherent jurisdiction. For the principles in the latter could be made to be readily applicable to the former (see further below).

[39] Alternatively, it is equally open for the contributories to ground their stay application, being one requested to take effect until the disposal of the appeal, under s. 73 of the CJA referred to earlier. Indeed, Gopal Sri Ram JCA (as he then was), in the Court of Appeal decision in *Equiticorp Holdings Ltd v. United Securities Sdn Bhd* [2007] 6 CLJ 268 even stated that a stay of winding-up order pending appeal would be properly pursued under s. 73 of the CJA and not s. 243 of the CA 1965. In his words of unrivalled precision:

> [7] As may be seen from the authorities discussed in *Vijayalakshmi Devi v. Dr Mahadevan*, s. 243(1) has nothing whatsoever to do with staying the effects of a winding-up order pending an appeal challenging the making of that order. The latter is governed by s. 73 of the Courts of Judicature Act 1964. There is also inherent jurisdiction in a High Court to stay the effects of its orders pending appeal. See, *Re Wickham* [1887] 35 Ch D 272; *Fitzholmes v. Waryam* AIR [1923] Lahore 514. Indeed, it is a logical step in the appellate process that if a party has a right of appeal conferred upon it then it has the right to seek and obtain a stay of the order appealed against: The remarks of the Supreme Court in *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* certainly lend support for that view. Further,

in *Chong Wooi Leong v. Lebbey Sdn Bhd (No. 2)* [1998] 2 CLJ 509, Abu Mansor JCA (later FCJ) considered it to be "trite law that a court which has given judgment certainly has the power to order stay."

[40] Applying any of s. 73 of the CJA, s. 492 of the CA 2016 on stay or the stay principles under the court's inherent jurisdiction, fundamentally, whether or not a stay would be granted is entirely the exercise of the court's discretion on the basis of the material before it as presented by the applicant who bears the burden of justifying the need for a stay. The contributories are certainly in possession of the right on legal standing to make that application, based on the language of s. 492.

[41] Although an appeal does not operate as a stay, the case of *Equiticorp Holdings Ltd v. United Securities Sdn Bhd* [2007] 6 CLJ 268 demonstrates that a successful stay pending appeal is far from being uncommonly granted. And s. 73 of the CJA additionally also sanctions the granting of stay pending appeal.

[42] An application for a stay of execution of judgment is also governed under O. 45 r. 11 of the Rules of Court 2012. A key requirement is that it must be based on matters which have occurred since the date of the judgment which is intended to be stayed is granted. Order 45 r. 11 provides as follows:

> 11. Matters occurring after judgment: Stay of Execution (O. 45 r. 11)
>
> Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks fit.

[43] In *London Permanent Benefit Building Society v. De Baer* [1967] 1 All ER 372, Plowman J examined the similarly worded rule as found in the O. 45 r. 11 of the Rules of Supreme Court and held follows:

> The power conferred by that rule to grant relief is a power to do so, and I quote, 'on the ground of matters which have occurred since the date of the judgment or order'.
>
> It is implicit in the rule that the matters referred to are matters which would or might have prevented the order being made or would or might have led to a stay of execution if they had already occurred at the date of the order ...

[44] *London Permanent Benefit Building Society* was followed in the Singapore High Court decision in *Sal Leasing (Pte) Ltd v. Hendmaylex Pte Ltd & Ors* [1987] 1 LNS 48; [1987] 2 MLJ 307 where Thean J held thus:

> I respectfully adopt the statement of law quoted above from the judgment of Plowman J., namely: it is implicit in Order 45 rule 11 that the matters referred to are matters which would or might have prevented the order being made or would or might have led to a stay of execution if they had already occurred at the date of the order.

[45] Both *London Permanent Benefit Building Society* and *Sal Leasing* have been followed by Malaysian cases, for example, in the judgment of Hamid Sultan Abu Backer J (as he then was) in *BBMB Leasing Sdn Bhd v. Aquacut Sdn Bhd & Ors (No 2)* [2011] 1 LNS 1249.

[46] As such, O. 45 r. 11 does not admit the court of wide discretion to permit an application for stay of execution. The applicant must demonstrate that his application falls within the scope of the said provision. The contributories in the instant case must be able to satisfy the court that there were matters that had occurred since the date of the winding-up order which would or might have prevented the order being made or would or might have led to a stay of execution if they had already occurred at the date of the order.

[47] The contributories stated that they have only recently obtained the grounds of the decisions of the High Court in NCC2 in respect of the granting of the interlocutory injunction and the dismissal of the setting aside of the joinder of the petitioner in the oppression action. The latter was averred to have been received on 13 September 2017 which was after my decision winding-up the respondent on 31 July 2017.

[48] As such, in my view, the discovery of the alleged conflicting findings upon the availability of the grounds of decision post the granting of the winding-up order could be validly characterised as a matter which occurred since the date of the order. Nevertheless, I should emphasise that strictly, O. 45 r. 11 cannot apply to winding-up proceedings because a winding-up order is not a form of execution in the first place (See the Court of Appeal decision in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Berhad & Other Appeals* [2001] 3 CLJ 248).

[49] Regardless, it is well-established that the objective of a stay, like in the instant case, is to preserve *status quo*. But a stay will only be granted not because, say, an appeal is filed, but instead only if there are special circumstances demonstrated by an applicant to support his application for the stay.

[50] The leading authority on this subject can be found in the Federal Court's decision of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257 which held that:

> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, a special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established.

[51] The Federal Court in *Kosma Palm Oil Mill* also held:

> The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406).

[52] In *Leong Poh Shee v. Ng Kat Chong* [1965] 1 LNS 90; [1966] 1 MLJ 86, Raja Azlan Shah J (as His Highness then was) described special circumstances in the following terms:

> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way than which is usual or common.

[53] The crux of the reason for stay in the application before me, in essence, is the potential for conflicting findings on the status of the consent judgment in light of the decisions by the High Court in NCC2 on the injunction against the transfer of the said lands, which as stated earlier, found that the questions surrounding the consent judgment raised serious issues to be tried, and that given the alleged dispute on the debt the petitioner should not have presented the petition for the winding-up of the respondent. However, it is clear that these are not definite findings, and more crucially, the proceedings were interlocutory in nature.

[54] Indeed, the findings made by the High Court in NCC2 on the two decisions may or may not later change as a result. For context, I need only refer to the following passage from the judgment of Gopal Sri Ram JCA (as he then was) in *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900:

> It is part of the function of a Judge hearing an application for an injunction to decide whether a serious question requiring trial is disclosed. He therefore does not exceed his proper role in such an interlocutory proceeding by commenting upon the credibility of the evidence or any issue as it lies before him at that stage. And any comments that he may make upon the nature and quality of the evidence or pleadings presented to him at that stage does not and cannot be said to infect his mind with bias. In my judgment, it is a most serious matter to allege bias against a Judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the State than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

> In my judgment, a Judge may, after expressing a view in the course of an interlocutory proceeding, quite properly hear the main action and come to a conclusion diametrically opposite to that expressed at the interlocutory level. Translated to a case such as the present, a Judge may grant an interlocutory injunction because he finds a particular line of defence taken to be untenable and yet, after hearing all the evidence and detailed argument at the trial, reach the opposite conclusion and dismiss the suit. I cannot help but think that such an occurrence is common place in our Courts as it is indeed in other jurisdictions.

[55] Nevertheless, I agree that there is a risk of conflicting findings on the key issues concerning the consent judgment which also extends to the question on the existence of a *bona fide* debt by the respondent to the petitioner.

[56] As stated earlier, the Supreme Court had already ruled in *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 that it is undesirable to allow a situation where two different courts try and determine the same issues arising between the same parties relating to the same subject matter. But I do not consider the two key underlying actions, the winding-up of the respondent in NCC1 and oppression action against the controlling shareholders of the respondent in NCC2 constitute a multiplicity of proceedings or in any manner an abuse of process. It is only that some of the material issues ventilated in one are also critical in the other. This is unlike the situation in the case of *Ho Num Chon & Anor v. Tech-Lab Manufacturing Sdn Bhd* [2017] 5 CLJ 187 where I held that the conduct of the petitioners in that case in instituting a winding-up petition when it had already commenced a minority oppression suit in a different court based on substantially the same fact, and seeking similar reliefs, including for the winding-up of the company was *prima facie* a multiplicity of proceedings and an abuse of process.

[57] In the context of the present application, I am therefore inclined to allow the stay on the basis of the potential for conflicting findings by two different courts on issues which are now already pending before the Court of Appeal. The filing of the various appeals *per se* would of course be insufficient to warrant a stay. Neither do I consider the argument that the appeal would be nugatory if it was allowed after the respondent had been wound up as sufficiently meeting the threshold of being a form of a special circumstance to justify a stay.

[58] But here, I consider the risk of conflicting decisions, on the evidence of what appears to be findings by the High Court in NCC2 on material issues which are contrary to the conclusions I arrived at in the deliberative process to wind up the respondent in NCC1, to be one that fulfils the character of being more than ordinary, and can even, under the circumstances, be construed as exceptional. It is therefore, rightly a form of special circumstances. At the same time, I take the view that the apparent conflict,

as more recently discovered, would also serve to meet the requirements of s. 492, which mandates, as stated above, "... proof to the satisfaction of the court" that all proceedings in relation to the winding-up of the respondent ought to be stayed.

[59] I do not think much prejudice if any, would be occasioned to the petitioner as a result, for the stay to be granted is only to operate for a specified and limited time, which, specifically is until the disposal of the appeals against the dismissal of the striking out of the petition and the granting of the winding-up order of the respondent at the Court of Appeal. In fact, neither did the petitioner show in what fashion the stay would cause any prejudice to the petitioner.

Conclusion

[60] In view of the foregoing reasons, I find that the contributories have succeeded in establishing special circumstances, and in satisfying the requirements of s. 492 of the CA 2016 to justify the granting of the stay of the winding-up order against the respondent for a limited time; that is only pending the disposal of the appeal of my decisions granting the said winding-up order and in dismissing their striking out application. As such, I allow encl. 42, with costs.